83 - 1737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

CONSOLIDATED X-RAY SERVICE CORPORATION
Petitioner,

v.

FORREST BUGHER, RICHARD WREN, REESE HAMMOND, J. A. MCMAHON, A. W. MCINTYRE, HAILEY ROBERTS, JOHN E. CULLERTON and RICHARD DENNIS, as Trustees of the CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, and CARL B. PRATT, VERGIL BELFI, JOHN FAUST and HAROLD B. HUHN, as Trustees of the HEALTH AND WELFARE FUND OF LOCAL 2, INTERNATIONAL UNION OF OPERATING ENGINEERS and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 2, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LARRY M. LESH
State Bar No. 12225000
LOCKE, PURNELL, BOREN, LANEY & NEELY
(A Professional Corporation)
3600 RepublicBank Tower
Dallas, Texas 75201
(214)754-7400

Attorneys for Petitioner
Consolidated X-Ray Service Corporation

QUESTIONS PRESENTED

I. WHETHER TRUSTEES OF A UNION'S PENSION AND WELFARE FUND, WHOSE CLAIMS OF DELINQUENT EMPLOYER CONTRIBUTIONS ARE BASED UPON A DISPUTED INTERPRETATION OF THE COVERAGE CLAUSES OF COLLECTIVE BARGAINING AGREEMENTS BETWEEN THE EMPLOYER AND THE UNION, ARE OBLIGATED TO ATTEMPT RESOLUTION OF THE DISPUTE THROUGH THE AGREEMENTS' MANDATORY GRIEVANCE AND ARBITRATION PROCEDURES BEFORE INSTITUTING SUIT AGAINST THE EMPLOYER TO RECOVER THE ALLEGED DELINQUENCY.*

II. WHETHER LANGUAGE IN COLLECTIVE BARGAINING AGREEMENTS WHICH STATES THAT "DELIBERATE FAILURE OR REFUSAL [BY THE EMPLOYER] TO MAKE DEDUCTION AND/OR REMITTANCE [OF DUES TO THE UNION] AS HEREIN PROVIDED ... SHALL CONSTITUTE A GROSS BREACH OF CONTRACT IN CONSEQUENCE OF WHICH THE UNION MAY TAKE APPROPRIATE ECONOMIC AND/OR LEGAL SANCTIONS" RELIEVES THE UNION FROM THE OBLIGATION TO RESOLVE A DISPUTE REGARDING THE INTERPRETATION OF THE AGREEMENTS' COVERAGE CLAUSES THROUGH THE AGREEMENTS' MANDATORY GRIEVANCE AND ARBITRATION PROVISIONS BEFORE RESORTING TO SUCH "ECONOMIC AND/OR LEGAL SANCTIONS".**

III. WHETHER AN APPELLATE COURT'S DECISION IS CONCLUSIVE AS THE LAW OF THE CASE UPON ISSUES WHICH WERE NEITHER PRESENTED TO THE COURT NOR DECIDED BY THE COURT.

---

*The identical question is pending before the Court in Cause No. 83-421 styled Consolidated X-Ray Service Corporation, Petitioner, v. Forrest Bugher, et al., Respondents, 52 U.S.L.W. 3315. On January 25, 1984, this Court heard arguments on similar issues in Cause No. 82-1860 styled Schneider Moving and Storage Co. v. Robbins, et al., and Cause No. 82-1862 styled Prosser's Moving and Storage Co. v. Robbins, et al., 52 U.S.L.W. 3675-3676.

**The identical question is pending before the Court in Cause No. 83-421 styled Consolidated X-Ray Service Corporation, Petitioner, v. Forrest Bugher, et al., Respondents.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES *Page*

INDEX OF AUTHORITIES (Continued)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

CONSOLIDATED X-RAY SERVICE CORPORATION
Petitioner,

v.

FORREST BUGHER, RICHARD WREN, REESE HAMMOND, J. A. MCMAHON, A. W. MCINTYRE, HAILEY ROBERTS, JOHN E. CULLERTON and RICHARD DENNIS, as Trustees of the CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, and CARL B. PRATT, VERGIL BELFI, JOHN FAUST and HAROLD B. HUHN, as Trustees of the HEALTH AND WELFARE FUND OF LOCAL 2, INTERNATIONAL UNION OF OPERATING ENGINEERS and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 2, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Consolidated X-Ray Service Corporation ("Consolidated") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment of February 23, 1984 in For-

rest Bugher, et al. v. Consolidated X-Ray Service Corporation, No. 83-1677.*

OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears as Appendix A to this petition. The judgment of the District Court from which the appeal was taken, and the District Court's unpublished memorandum opinion appear as Appendix B. The orders of the Court of Appeals denying Consolidated's petition for rehearing and suggestion for rehearing en banc appear as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1984. A timely motion for rehearing and suggestion for rehearing en banc were denied on March 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Sections 203(d), 301 and 302 of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 173(d), 185, 186 (1976). These statutory provisions are set forth in Appendix D.

STATEMENT OF THE CASE

Beginning in 1971, Consolidated and Respondent International Union of Operating Engineers, Local 2, AFL-CIO (the "Union") executed successive collective bargaining agreements, each of which was effective for a term of three years.

*When this suit was instituted, Consolidated was a wholly owned subsidiary of Lomas & Nettleton Financial Corporation, which has its principal office in Dallas, Texas. Consolidated is now a wholly owned subsidiary of Costain Processing Engineering & Construction Ltd., which has its principal office in London, England.

The jurisdictional clause in the collective bargaining agreement which was effective from 1971 until 1974 (the "1971 agreement") provided:

> "This agreement shall apply to and cover all employees engaged in field non-destructive testing."

The jurisdictional clause in the collective bargaining agreement which was effective from 1974 until 1977 (the "1974 agreement") provided:

> "This agreement shall apply to and cover all employees engaged in field non-destructive testing, excluding Alaska, nuclear power plants and visual inspection."

The jurisdictional clause in the collective bargaining agreement which was effective from 1977 until 1980 (the "1977 agreement") provided:

> "This agreement shall apply to and cover all employees engaged in field pipeline or pipeline related non-destructive testing including all employees who furnish rigs and equipment and the performance of services; *excluding* Alaska, nuclear power plants, and *laboratory work and that work considered in the industry as city or call-out work*; and the company recognizes the Union as the exclusive bargaining agent for all such employees" (emphasis supplied).

The collective bargaining agreement which was effective from 1980 until 1983 (the "1980 agreement") contained a jurisdictional clause which was substantially identical to the jurisdictional clause in the 1977 agreement.

The collective bargaining agreements contained a "40-hour guaranty" by which Consolidated guaranteed "40 hours of work per week for each full calendar week employed"; the clause stated, however, that "where no work is available in an employee's classification" Consolidated

had the right "to assign the employee to any other work for which he is qualified, which work shall apply toward the guaranty ..."

The agreements contained "check-off" provisions which obligated Consolidated to deduct Union dues from covered employees' pay and "remit the amount deducted to ... the Union ... The deliberate failure or refusal ... to make deduction and/or remittance as herein provided ... shall constitute a gross breach of contract in consequence of which the Union may take appropriate economic and/or legal sanctions."

The agreements also required Consolidated to make specified contributions in behalf of employees "covered by this agreement" to the Union's pension fund, the Trustees of which were Respondents Forrest Bugher, Richard Wren, Reese Hammond, J. A. McMahon, A. W. McIntyre, Hailey Roberts, John E. Cullerton and Richard Dennis (the "Pension Trustees"); and to the Union's health and welfare fund, the Trustees of which were Respondents Carl B. Pratt, Vergil Belfi, John Faust and Harold B. Huhn (the "Welfare Trustees"). Contributions to the funds were to "commence for all new employees upon their 31st calendar day of employment ..."

The agreements specified the procedure by which "grievances or disputes ... shall be handled." The last step in the mandatory grievance procedure was arbitration. The agreements defined the term "grievance" to mean "a dispute arising between the parties to this agreement or between any employee or employees ... and the Company."

Consolidated and the Union executed successive "Central Pension Fund Participating Agreements" which were applicable to the 1971, 1974 and 1977 agreements. These participating agreements expressed cognizance of the Union's pension fund trust instrument; stated that

contributions to the Union's pension fund "shall be ... as set forth in" the collective bargaining agreements between Consolidated and the Union and were to be "in effect for the period stipulated in" the collective bargaining agreements; and stated that in "all other respects" the parties ratified and confirmed the pension fund trust instrument and agreed to be "bound by each and every provision contained therein ..."

Neither Consolidated nor the Union executed similar participating agreements with respect to the Union's welfare fund. During negotiations Consolidated and the Union excised from the collective bargaining agreements provisions which would have incorporated the pension fund trust instrument and the welfare fund trust instrument.

The pension fund trust instrument authorized the Pension Trustees to "take any action necessary to enforce payment of the contributions due hereunder, including, but not limited to, proceedings at law and in equity." It stated that the amount "due hereunder" was "as agreed upon between the ... local Union and the employer" and that "the rate of contributions shall, at all times, be governed by the aforementioned collective bargaining agreement ..."

The welfare fund trust instrument stated, "In the event that any payment due ... is delinquent ... the Trustees may ... bring suit for all amounts due and owing, and if suit is brought, the Employer shall be liable, in addition to its delinquency, for Court costs, reasonable attorneys fees and liquidated damages ..."

In 1975 auditors for the Pension Trustees and Welfare Trustees commenced an audit of Consolidated's contributions to the funds. Based upon the audit, which was completed in February of 1976, the Pension Trustees, Welfare

Trustees and Union claimed that Consolidated was delinquent in contributions to the funds and remittances of dues to the Union. Consolidated contended that the Pension Trustees, Welfare Trustees and Union erroneously demanded fund contributions and dues remittances for employees who were not members of the Union and for work which was beyond the scope of the coverage of the applicable collective bargaining agreements.

The Pension Trustees, Welfare Trustees and Union thereupon instituted this suit to recover from Consolidated the alleged delinquent fund contributions and dues remittances. Consolidated defended on the ground, among other things, that the Pension Trustees, Welfare Trustees and Union failed to exhaust the mandatory grievance and arbitration provisions of the applicable collective bargaining agreements.

On July 2, 1981, the District Court entered judgment awarding the Pension Trustees, Welfare Trustees and Union recovery of fund contributions and dues remittances found to be delinquent for the period February 20, 1971 through December 31, 1975. The judgment certified finality pursuant to Rule 54(b), Fed. Rules Civ. Pro.; directed the parties to submit supplemental audits for the period following December 31, 1975; and stated that "The Court shall enter such judgment as may be due unto the plaintiffs" for the period following December 31, 1975.

In an opinion dated May 31, 1983, a panel of the Court of Appeals affirmed the judgment. The opinion (1) held that, despite the District Court's determination that the dispute among the parties was "essentially based on differing interpretations of the coverage clauses of the collective bargaining agreements" 515 F. Supp. at 1184, the Pension Trustees, Welfare Trustees and Union were not required to exhaust the mandatory grievance and arbitra-

tion provisions of the collective bargaining agreement; (2) refused to consider Consolidated's defense regarding Section 302 of the Act because "Consolidated did not question the legality of the agreements' contribution provisions in the District Court"; and (3) held that the District Court's awards of attorney fees and interest were proper, *Bugher v. Consolidated X-Ray Service Corporation*, 515 F.Supp. 1180 (D.C. Tex. 1981), aff'd 705 F.2d 1426 (5th Cir. 1983), on rehearing 711 F.2d 713, cert. filed 52 U.S.L.W. 3315 ("Consolidated I").

Subsequently, the Pension Trustees, Welfare Trustees and Union filed an amended complaint seeking recovery of fund contributions and dues remittances alleged to be delinquent for the period following December 31, 1975. Consolidated's pleadings in response to the amended complaint, and a pretrial order entered by the District Court on September 29, 1982 preserved Consolidated's defenses regarding the mandatory grievance and arbitration procedures of the collective bargaining agreements, and Section 302 of the Act.

On September 20, 1983, the District Court entered a supplemental judgment awarding the Pension Trustees, Welfare Trustees and Union amounts found to be due as delinquent fund contributions and dues remittances for the period January 1, 1976 through July 31, 1981. The supplemental judgment also certified finality pursuant to Rule 54(b), Fed. Rules Civ. Pro. Consolidated's appeal from the supplemental judgment preserved the issues regarding the collective bargaining agreements' mandatory grievance and arbitration procedures, and Section 302 of the Act.

In an unpublished opinion dated February 23, 1984, a panel of the Court of appeals affirmed the District Court's supplemental judgment, *Bugher, et al. v. Consolidated X-*

Ray Service Corporation, Docket No. 83-1677 (5th Cir. 1984) ("Consolidated II"). The opinion was grounded upon the theory that *Consolidated I* was conclusive as the law of the case on all of the issues raised in *Consolidated II*, and precluded Consolidated from arguing that Consolidated was not required to make fund contributions and dues remittances "with respect to rehired employees until they had served additional probationary periods"; from urging "its interpretation of the 40-hour guaranty clause of the collective bargaining agreements"; and from arguing that the District Court "erroneously applied the jurisdictional clause set forth in Article 1 of the relevant collective bargaining agreements" (Opinion, p. 3). The opinion stated, "Although the final collective bargaining agreement was not considered in Consolidated I, the jurisdictional clause is indistinguishable from the clause considered in Consolidated I and the interpretation given that clause in Consolidated I controls" (Opinion, pp. 3-4). The opinion also concluded that "the issues litigated prior to entry of [the District Court's judgment in Consolidated I] included the legality and enforceability of the collective bargaining agreements. That issue was not open for relitigation in the District Court" (Opinion, p. 4).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DETERMINATION IN CONSOLIDATED I THAT THE PENSION TRUSTEES AND WELFARE TRUSTEES WERE NOT REQUIRED TO ATTEMPT TO EXHAUST MANDATORY GRIEVANCE AND ARBITRATION PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY, IS INCONSISTENT WITH DECISIONS OF THIS COURT, AND CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS.

Consolidated's petition for certiorari in *Consolidated I*, together with the petitioners' briefs in *Robbins v. Prosser's Moving and Storage Co.*, 711 F.2d 433 (8th Cir. 1983), cert. granted 104 S.Ct. 66 (1983), showed that the Court of Appeals' determination in *Consolidated I* that the Pension Trustees and Welfare Trustees were not required to attempt to exhaust the collective bargaining agreements' mandatory grievance and arbitration provisions was in conflict with numerous decisions of this Court, including *Kaiser Steel v. Mullins*, 455 U.S. 72 (1982); *Clayton v. Automobile Workers*, 451 U.S. 679 (1981); and *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-653 (1964); and *United States v. Carter*, 353 U.S. 210 (1957).

In *Maddox*, this Court held that a discharged employee was required to attempt to exhaust a collective bargaining agreement's mandatory grievance and arbitration provisions before instituting suit under Section 301 of the Act to enforce a claim for the severance pay specified in the agreement. This Court reasoned that a contrary rule would cut across the interests of the employer and the union, would "deprive the employer and union of the ability to establish a *uniform* and *exclusive* method for orderly settlement of employee grievances" (emphasis supplied), and would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements" 379 U.S. at 653. Although the ex-employee did not question the propriety of the discharge and was therefore eliminated from the unit represented by the union, it did not:

> "[F]ollow that the resolution of his claim can have no effect on future relations between the employer and other employees. Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employ-

> ment relationship ... . If applicable law did not require resort to contract procedures, the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting affect on reaching an agreement" 379 U.S. at 656.

The agreement's use of the permissive terms "may discuss" did not reveal "a clear understanding between the contracting parties that individual employees, unlike either the Union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation" 379 U.S. at 659.

Accordingly, the obligation to exhaust a collective bargaining agreement's mandatory grievance and arbitration provisions is not governed by the existence or non-existence of a union's duty of fair representation.[1] It is governed by the effect of the dispute "on future relations between the employer and other employees" and whether the contract terms in question "are of obvious concern to all employees and a potential cause of dispute so long as any employee maintains a continuing employment relationship" *Maddox*, *supra*, 379 U.S. at 656.

Therefore, the arbitrability of a dispute must of necessity govern a union's duty of fair representation. In *Mad-*

[1] Without discussing or attempting to distinguish *Maddox*, a divided panel of the Eighth Circuit in *Anderson v. Alpha Portland Industries*, _____F.2d _____, 115 L.R.R.M. 2249 (8th Cir. 1984) held that retirees were not required to attempt exhaustion of a collective bargaining agreement's mandatory grievance and arbitration procedures, reasoning that exhaustion should be "excused where the Union is in control of the contractual remedy but owes no duty of fair representation to the plaintiff" and that "because plaintiffs are retirees the Union owes them no duty of fair representation" _____F.2d _____, 115 L.R.R.M. at 2251.

dox, the union's arbitrary refusal to pursue the ex-employee's grievance would have violated that duty, vesting in the ex-employee a cause of action against both the union and the former employer, *Bowen v. United States Postal Service*, ____ U.S. ____, 103 S.Ct. 588, 593 (1983); *Vaca v. Sipes*, 386 U.S. 171 (1967).

In the case at bar the dispute was, as the District Court observed in *Consolidated I*, "based upon differing interpretations of the coverage clauses of the collective bargaining agreements" 515 F.Supp. at 1184. That dispute plainly would have a significant "effect on future relations between" Consolidated and its employees, *Maddox*, *supra*, 379 U.S. at 656. The coverage clauses of the collective bargaining agreements were "of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship" with Consolidated, *Id.* Accordingly, the principles enunciated in *Maddox* establish that the grievances in the case at bar, even though they were asserted on behalf of individuals who may have been eliminated from the unit represented by the Union, were subject to the collective bargaining agreements' mandatory grievance and arbitration procedures.

The Pension Trustees and Welfare Trustees were not relieved from the obligation to attempt to exhaust the agreements' mandatory grievance and arbitration provisions simply because they were not signatory parties to the agreements. They were "third-party beneficiaries" of the agreements who were "subject to the contract defenses of nonperforming promissors" *Mullins*, *supra*, 102 S.Ct. 859, n. 8. Moreover, they stood "in the shoes of the employees" and acted "solely on behalf of the employees" *Carter*, *supra*, 353 U.S. at 220.

Nor were the Trustees relieved from this obligation simply because the trust instruments stated that the

Trustees were authorized to "take any action necessary to enforce payment of the contributions due hereunder" and that "In the event that any payment due from an employer is delinquent ... the Trustees may ... bring suit for collection of all amounts due and owing ... " This language did not "of itself reveal a clear understanding between the contracting parties that" the Pension Trustees and Welfare Trustees, unlike the Union, Consolidated, and Consolidated's employees or former employees were "free to avoid the contract procedure ... in favor of a judicial suit"; there existed doubts which "must be resolved against such an interpretation" *Maddox*, *supra*, 379 U.S. at 658-659; *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-584 (1960). As the Seventh Circuit aptly stated in *Central States Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F.2d 171, 172-173 (7th Cir. 1980) until the dispute regarding the interpretation of the agreements' coverage clauses could be resolved it would be "impossible to determine whether there is any delinquency on which to base a collection action ... The parties to the contract clearly intended ... that such questions of contract interpretation be resolved by arbitration."

Finally, the Pension Trustees and Welfare Trustees could not escape the agreements' mandatory grievance and arbitration procedures simply because the Union was a party to the suit. Even though the Union was a party, the court's function remained "very limited"; because Consolidated and the Union agreed to submit all grievances and disputes to an arbitrator, the court had "no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim," *Steel-*

workers v. American Manufacturing Co., 363 U.S. 564, 567-568 (1960).

Accordingly, the Court of Appeals in *Consolidated I* erroneously held that the Pension Trustees and Welfare Trustees were not obligated to attempt to exhaust the mandatory grievance and arbitration procedures specified in the collective bargaining agreemments. The Union's arbitrary refusal to pursue the Trustees' claims would vest in the Trustees a cause of action against both the Union and Consolidated, *Bowen*, *supra*; *Vaca*, *supra*.

II. THE COURT OF APPEALS' HOLDING IN CONSOLIDATED I THAT THE UNION WAS NOT REQUIRED TO EXHAUST THE COLLECTIVE BARGAINING AGREEMENTS' MANDATORY GRIEVANCE AND ARBITRATION PROVISIONS BEFORE RESORTING TO "ECONOMIC AND/OR LEGAL SANCTIONS" IS A GLARING CONTRAVENTION OF THE CONGRESSIONALLY AND JUDICIALLY DECLARED POLICY FAVORING ARBITRATION OF LABOR DISPUTES, AND IS CONTRARY TO OTHER CIRCUIT COURT DECISIONS.

This Court has repeatedly enunciated and applied a national labor policy encouraging "private rather than judicial resolution of disputes arising over the interpretation and application of collective bargaining agreements" *Clayton*, *supra*, 451 U.S. at 687 and mandated a "strong presumption" which requires that all "doubts be resolved in favor of" arbitrability of a grievance, *Nolde Brothers, Inc. v. Local No. 358*, 430 U.S. 243, 254-255 (1977); *Steelworkers v. Warrior & Gulf Navigation, Inc.*, *supra*. The collective bargaining agreements in the case at bar contained no provision relieving the Union from the obligation to resolve disputes regarding the interpretation of the agreements' coverage clauses through the agreements'

mandatory grievance and arbitration procedures. They merely provided that "deliberate failure or refusal ... to make deduction and/or remittance as herein provided ... shall constitute a gross breach contract in consequence of which the Union may take appropriate economic and/or legal sanctions." They did not, however, vest in the Union the right unilaterally to determine that a "deliberate failure or refusal ... to make deduction and/or remittance as herein provided" had occurred. That determination was the exclusive province of the arbitrator, *Steelworkers v. American Manufacturing Co., supra*; *Johnston-Tombigbee Furniture Manufacturing Co. v. Local Union 2462*, 596 F.2d 126, 129 (5th Cir. 1979).

Accordingly, the Court of Appeals in *Consolidated I* erroneously held that the Union was not required to attempt to exhaust the agreements' grievance and arbitration procedures before resorting to "economic and/or legal sanctions."

III. THE COURT OF APPEALS' DETERMINATION IN CONSOLIDATED II THAT CONSOLIDATED I WAS CONCLUSIVE AS THE LAW OF THE CASE ON ISSUES WHICH WERE NOT BEFORE THE COURT OR DECIDED IN CONSOLIDATED I IS DIRECTLY CONTRARY TO NUMEROUS DECISIONS OF THIS COURT AND OF COURTS OF APPEALS.

This Court and the courts of appeals have consistently held that the "law of the case" doctrine is inapplicable to issues which were not before the court or decided on the prior appeal, *Hartford Life Insurance Co. v. Blincoe*, 255 U.S. 129, 136 (1920) ("Certainly, omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not respondent to"); *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Pegues v. Morehouse Parish School Board*, 706 F.2d 735

(5th Cir. 1983); *Conway v. Chemical Lehman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981); *City of Cleveland v. Federal Power Commission*, 561 F.2d 344, 348 (D.C. Cir. 1977) (The law of the case doctrine "does not apply to points not decided on a previous appeal, even though they could have been").

In the case at bar, the District Court in *Consolidated I* found delinquencies in contributions to the funds and remittances of dues to the Union for the period February 20, 1971 through December 31, 1975. The 1971 and 1974 agreements were in effect during that period.

In *Consolidated II*, the District Court found delinquencies in fund contributions and dues remittances for the period January 1, 1976 through January 31, 1981. The 1977 and 1980 agreements were in effect during that period.

Contrary to the reasoning of the Court of Appeals in *Consolidated II*, the jurisdictional clauses of the 1977 and 1980 agreements which were before the Court in *Consolidated II* were by no means "indistinguishable from the clause considered in *Consolidated I*." As the District Court observed in *Consolidated I*, the jurisdictional clauses in the 1977 and 1980 agreements were "changed significantly" from the jurisdictional clauses in the 1971 and 1974 agreements which were at issue in *Consolidated I*, 515 F.Supp. at 1182. Unlike the jurisdictional clauses in the 1971 and 1974 agreements, the jurisdictional clauses in the 1977 and 1980 agreements explicitly excluded "laboratory work and that work considered in the industry as 'city' or 'call-out' work".

Consolidated argued before the District Court and Court of Appeals in *Consolidated II* that neither the "40-hour guaranty" clauses nor any other provision of the 1977 and 1980 agreements obligated Consolidated to

make contributions to the funds or remittances of dues to the Union for hours during which employees performed "laboratory work and that work considered in the industry as 'city' or 'call-out' work", i.e., work which was excluded from the jurisdictional clauses of the 1977 and 1980 agreements. Because the 1971 and 1974 agreements did not contain such exclusions, that issue was not before the District Court or Court of Appeals in *Consolidated I*; consequently, that issue was not, and could not have been, decided in *Consolidated I*.

Moreover, nothing in the pleadings, the evidence, the District Court's opinion or the Court of Appeals' opinion in *Consolidated I* remotely decided that the waiting periods specified in the 1977 and 1980 agreements for contributions to the funds were inapplicable to employees who had previously been terminated by Consolidated. That issue was raised for the first time in *Consolidated II*.

Finally, the issues litigated in *Consolidated I* did not include the enforceability under Section 302 of the Act of Consolidated's obligation to make contributions to the funds. The Court of Appeals declined to consider that issue because Consolidated had not pleaded it in the District Court. Thus, neither the District Court nor the Court of Appeals in *Consolidated I* entered judgment on the merits of Consolidated's defense regarding Section 302 of the Act.

Nevertheless, the Court of Appeals in *Consolidated II* concluded that *Consolidated I* was conclusive as the law of the case on all the issues raised in *Consolidated II*. The Court of Appeals based this decision upon *Pegues v. Morehouse Parish School Board*, *supra*, and *Conway v. Chemical Lehman Tank Lines, Inc.*, *supra*, both of which rejected application of the law of the case doctrine to issues which were not decided in the prior appeals.

In *Pegues* the Court of Appeals said at 706 F.2d p. 738:

> "... The law of the case concept applies to a single proceeding, and operates to foreclose reexamination of decided issues either on remand or on a subsequent appeal ... Unlike res judicata, *the law of the case doctrine does not encompass issues presented for decision but left unanswered by the appellate court*" (emphasis supplied).

Similarly, in *Conway* the Court of Appeals, holding that reversal of a new trial which had been granted on one of two grounds did not constitute the law of the case precluding a later grant of a new trial on the remaining ground, said at 644 F.2d, pp. 1061-1062:

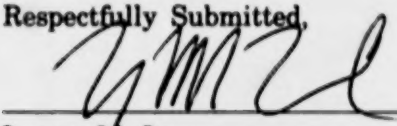
> "... Unlike common law res judicata, the law of the case established by a prior appeal does not extend to preclude consideration of issues not presented or decided on the prior appeal. The law of the case doctrine 'does not include all questions which were present in a case and which might have been decided but were not.' ... 'The doctrine of the law of the case applies only to the issues decided, not to all those presented for decision but left unanswered.' ..."

In the case at bar, the issues raised in *Consolidated II* were neither expressly or impliedly decided in *Consolidated I*. Consequently, *Consolidated I* was not, and could not have been, conclusive as the law of the case on the issues raised in *Consolidated II*. The Court of Appeals' contrary ruling is in direct conflict with uniform decisions of this Court and numerous courts of appeals.

CONCLUSION

For the foregoing reasons, certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully Submitted,

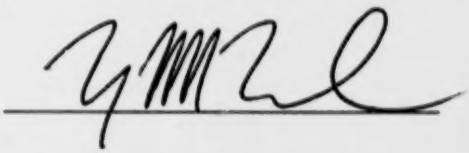


LARRY M. LESH
State Bar No. 12225000
LOCKE, PURNELL, BOREN, LANEY & NEELY
(A Professional Corporation)
3600 RepublicBank Tower
Dallas, Texas 75201
(214) 754-7400

Attorneys for Defendant
Consolidated X-Ray Service Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded by United States Mail to counsel of record on this 24 day of April, 1984.



APPENDIX A

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

NO. 83-1677
SUMMARY CALENDAR

FORREST BUGHER, *et al.*,
Plaintiffs-Appellees,
versus
CONSOLIDATED X-RAY SERVICE CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(February 23, 1984)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.
DAVIS, Circuit Judge:

This claim for delinquent contributions asserted by pension and welfare trustees and a labor union against an employer is before us for the second time. This court's opinion following the first appeal is reported at 705 F.2d 1416 (1983) (Consolidated I) and it is unnecessary to restate all the factual and legal circumstances leading to that appeal.

In summary, Consolidated I was decided following an appeal from a judgment of the district court (entered under Rule 54(b) FRCP) holding that Consolidated had deliberately failed to deduct union dues and to contribute

to the welfare and pension funds as required. The 54(b) judgment entered by the district court and affirmed in Consolidated I ordered payment of amounts delinquent from February 20, 1971, through December 1975 as shown by audits accepted by the district court. The district court also ordered Consolidated to submit to a supplemental audit to update the amounts owed under the relevant statutes and collective bargaining agreements. In compliance with this order, plaintiffs' auditors submitted their supplemental audit showing approximately $153,000 due. Thereafter, defendant filed rebuttal audit reports claiming a substantial overpayment. After the parties were unable to resolve their differences as to the amount owed, the district court convened a hearing to consider this question.

We agree with the district court that two basic reasons surfaced at the hearing for the discrepancy between the two audits.

First, the defendant refused to follow the interpretation given the language of the relevant collective bargaining agreements by the district court and by this court in Consolidated I.

Second, defendant reurged the argument it attempted to make for the first time in this court in Consolidated I that the trust fund instruments did not comport with the requirements of 29 U.S.C. 186(c)(5) and therefore the collective bargaining agreements requiring contributions to those funds were illegal and unenforceable.

I.

With respect to defendant's interpretation of the collective bargaining agreements which it reurges upon us, defendant is bound under the law of the case doctrine to the interpretation we gave to that language in Consoli-

dated I. *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735 (5th Cir. 1983). The following contentions of Consolidated were considered by the court in Consolidated I and defendant is not entitled to reconsideration of those issues:

1) Consolidated argues that it was not obliged to submit payments to the pension and welfare fund trustees with respect to rehired employees until they had served additional probationary periods; 2) Consolidated reurged its interpretation of the 40-hour guarantee clause of the collective bargaining agreements; 3) Consolidated argues that appellees' accountants erroneously applied the jurisdictional clause set forth in Article 1 of the relevant collective bargaining agreements. Although the final collective bargaining agreement was not considered in Consolidated I, the jurisdictional clause is indistinguishable from the clause considered in Consolidated I and the interpretation given that clause in Consolidated I controls.

II.

Appellant, for its second ground of appeal, argues for various reasons that the trust fund instruments are defective in that the requirements of 29 U.S.C. 186(c)(5) have not been complied with. In Consolidated I, 705 F.2d 1435, we stated:

> Although phrased in the language of insufficiency of evidence, Consolidated's complaint about the adequacy of the trust fund instruments is in fact a claim that under § 186 the collective bargaining agreements are illegal and hence unenforceable. Yet Consolidated did not question the legality of the agreement's contribution provisions in the district court.

We decline to consider that issue now for the first time, on appeal.

The judgment appealed from in Consolidated I was a judgment on less than all claims and certified as final under Rule 54(b), FRCP. However, the issues litigated prior to entry of that judgment included the legality and enforceability of the collective bargaining agreements. That issue was not open for relitigation in the district court. See *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735 (5th Cir. 1983); *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981).

Out of an abundance of caution, the district court heard evidence on this defense and rejected defendant's contention that the requirements of 29 U.S.C. 186(c)(5) had not been met. We find no error in this determination by the district judge.

AFFIRMED.

APPENDIX B

APPENDIX B

IN THE

United States District Court for the Northern District of Texas

DALLAS DIVISION

FORREST BUGHER, *et al*
vs.
CONSOLIDATED X-RAY SERVICE CORPORATION, a Corporation

CA-3-76-0929-C

SUPPLEMENTAL OPINION

Plaintiffs have moved for a supplemental judgment for the period of time after the period covered by the final judgment in this civil action.

Both Parties have submitted supplemental audits. The differences between the two are due only to Defendant's refusal to accept the rulings of this Court in its opinion entered before the final judgment. The changes in the language of agreements successive to the ones discussed in the prior opinion were followed by Plaintiffs' auditors in making the supplemental audit when those changes made material differences in the coverage of the union contract.

The only new matter which Defendant has put forth in defense of its failure to perform its contractual obligations is that Plaintiffs have not proven that they have met the criteria of 29 U.S.C. § 186. As noted by the Fifth Circuit at _____F.2d _____ (slip op. 6364, Aug. 12, 1983),

Defendant did not plead this defense as required by F.R.Civ.P. 8(c). It is too late to bring this up after final judgment has been entered. Also, the Court would note that only because this Court inadvertently did not sign the original pretrial order in this civil action in which there was a stipulation that would have taken care of the contention, has Defendant been able to make this argument. Beyond this, out of an abundance of caution, Plaintiffs presented adequate evidence at the hearing on the Motion for Supplemental Judgment to negate Defendant's unplead defense.

The Court does find that Defendant has been willfully delinquent in making its contributions so it concludes that Defendant should pay liquidated damages equal to 20% of the delinquent contributions plus pre-judgment interest as required by 29 U.S.C. §§ 1132(g) (2) & 1145. Defendant should also pay the costs of collecting the contributions, Plaintiffs' audit fees and attorneys' fees.

So the Court will enter judgment for Plaintiff in the principal sum of $153,618.58, the 20% penalty, the pre-judgment interest, reasonable audit fees of $52,409.00 and reasonable attorneys' fees of $85,766.30. Plaintiffs' counsel is requested to propose a form of judgment.

/s/W. M. TAYLOR

UNITED STATES DISTRICT JUDGE

Sept. 1, 1983

Date

IN THE

United States District Court

for the

Northern District of Texas

DALLAS DIVISION

FORREST BUGHER, RICHARD WREN, REESE HAMMOND, J.A. MCMAHON, A.W. MCINTYRE, HAILEY ROBERTS, JOHN E. CULLERTON and RICHARD DENNIS, as Trustees of the CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS,

and

CARL B. PRATT, VERGIL BELFI, JOHN FAUST and HAROLD B. HUHN, as Trustees of the HEALTH AND WELFARE FUND OF LOCAL 2, INTERNATIONAL UNION OF OPERATING ENGINEERS and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 2, AFL-CIO

vs.

CONSOLIDATED X-RAY SERVICE CORP.

Civil Action No. CA-3-76-0929-C

FINAL JUDGMENT AND PERMANENT INJUNCTION

On July 2, 1981, in the Civil Action styled and captioned above, a Final Judgment and Order was entered by the Court, pursuant to the Findings of Fact and Conclusions of Law set forth in the Court's Opinion of June 2, 1981. The Court, therein, directed Defendant to submit certain books and records for examination by Plaintiff's auditors, for the purpose of a supplemental audit beginning January 1, 1976, through the period ending July 31, 1981. In accordance with the Court's directive, the supplemental audit was performed, and on August 24 and 25, 1982, this cause came on for hearing upon Plaintiff's Motion for Supplemental Judgment, essentially seeking judgment for the delinquency specified in the supplemental audit.

In proceedings conducted on March 18, 1982, Plaintiff was heard to present its motion for injunctive relief, pursuant to section 515 of the Employee Retirement Income Security Act of 1974, and the Court, upon the entire record, entered an Injunction restraining Defendant from failing or refusing to submit timely and accurate contributions to Plaintiff Trust Funds; this injunctive relief is hereby made permanent, as is more fully set forth hereinafter.

On August 24 and 25, 1983, the parties were heard to present their pleadings, their evidence, and arguments of counsel, including briefs and supplemental briefs filed by both Plaintiffs and Defendant, advancing their respective positions with regard to the supplemental audit. The Court, in due course, entered its Opinion of September 1, 1983, containing Findings of Fact and Conclusions of Law, upon which this judgment is based.

As is more fully set forth in the Supplemental Opinion of September 1, 1983, the only new matter which Defen-

dant has set forth in defense of its failure to perform its contractual obligations is a belated contention that Plaintiffs are under a burden to prove that the Trust funds meet the criteria set forth at 29 USC Section 186, and that Plaintiffs have failed to establish and carry such burden of proof; as noted by the United States Court of Appeals for the Fifth Circuit at _____ Fed 2nd _____ (slip opinion 6364, Aug. 12, 1983), the Defendant, as found by the Fifth Circuit on appeal, is prohibited by rule 8(c) from subsequently pleading such a defense; further, the Court specifically concludes, as a matter of law, whether Defendant has timely presented such an affirmative defense or not, that Plaintiff, in the course of this supplemental hearing, presented clear and convincing evidence that all Plaintiff Funds have in all respects complied with the National Relations Act, and such funds are operating and exist in accordance with law.

The Court has carefully considered all pleadings, evidence, and arguments advanced by Defendant in the supplemental hearing, and all previous Findings of Fact entered by the Court in the original proceeding are hereby reaffirmed, Defendant having raised no new issue not previously considered. Specifically, the Court again finds that the respective auditors for these litigants disagreed only over the inclusion and exclusion of personnel based upon differing positions with regard to the language of the collective bargaining contract, which the Court again finds to be clear, unambiguous, and not subject to any need for interpretation or clarification. The Court finds that Plaintiff's auditor properly included all personnel encompassed by the coverage clause in each of the successive agreements.

Similarly, with the exception noted above, the Court finds that no new issue of law has been introduced into

this proceeding, and all Conclusions of Law expressed in the original Opinion, and Judgment, are hereby reaffirmed.

Upon the entire record, the Court finds that the Defendant has been willfully delinquent in contributing in accordance with its contractual obligation to do so, and concludes that Defendant has willfully violated Section 515 of the Employee Retirement Income Security Act of 1974. Accordingly, Defendant shall be, and hereby is, permanently enjoined from failing and refusing to properly submit timely contributions to Plaintiff Trust Funds, so long as there is a contractual obligation to do so. As is Plaintiffs right, Plaintiff shall at all reasonable times be provided access to books and records, as set forth in the Final Judgment and Order of July 2, 1981, for purposes of assuring the Defendant's compliance with the terms of this Injunction and compliance with the terms of the Defendant's contractual obligations. The Court, for purposes of this Injunction, shall retain jurisdiction in this cause should Defendant engage in further or other violations.

In accordance with the Court's finding that the Defendant has been willfully delinquent, Defendant shall be, and hereby is, ordered to pay liquidated damages equal to 20% of the delinquent contributions, together with prejudgment interest as required by 29 USC 1132, et seq, to be computed in accordance with the formulae prescribed by Section 6621 of the Internal Revenue Code, such interest to be computed from the date each delinquent monthly payment came due, and in accordance with article IV of the Central Pension Fund Trust Agreement.

Plaintiffs are granted judgment in the principal sum of $153,618.58, upon which the foregoing liquidated damages and pre-judgment interest shall be computed.

Plaintiffs are further entitled to recover from Defendant reasonable audit fees of $52,409.90, and reasonable attorney fees in the amount of $99,414.31, representing fees incurred subsequent to the first trial in this case, and Plaintiffs are entitled to recover Costs of Court incurred herein.

Pursuant to rule 54(b), the Court finds no just cause for delay in the entry of this Judgment as part of a multiple claim. Accordingly, the foregoing Judgment is hereby entered as a Final Judgment, for which Plaintiffs are awarded execution.

/s/W. M. TAYLOR

UNITED STATES DISTRICT JUDGE

Date 9/20/83

APPENDIX C

APPENDIX C

IN THE

Court of Appeals for the Fifth Circuit

NO. 83-1677

FORREST BUGHER, *et al.*,
Plaintiffs-Appellees,

versus

CONSOLIDATED X-RAY SERVICE CORPORATION, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 23, 5 Cir., 1984, _____F.2d_____)

(MARCH 21, 1984)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Pro-

cedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/W. EUGENE DAVIS

UNITED STATES CIRCUIT JUDGE

APPENDIX D

APPENDIX D

AN ACT
THE NATIONAL LABOR RELATIONS ACT

Title II - Conciliation of Labor Disputes In Industries Affecting Commerce; National Emergencies

FUNCTIONS OF THE SERVICE

SEC. 203.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * *

Title III
SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such

labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be con-

strued to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or

both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of

the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, that no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, that the requirements or clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, that no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workmen's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended, or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

[ED. NOTE: Subsections (a), (b), and (c) were amended by Section 505 of the Labor Management Reporting and Disclosure Act of 1959. The amendments revised Secs. (a) and (b), expanded subsection (c), and added subsections (a)(2), (3), and (4); (b)(2); and (c)(6). Subsection (c)(7) was added by P.L. 91-86, October 14, 1969.

Subsection (c)(8) was added by P.L. 93-95, August 15, 1973.

Subsection (c)9 was added by P.L. 95-524, October 27, 1978.]

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise

lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.